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NO. 89-258

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Appellant,

VS.

AMERICAN STORES COMPANY, ALPHA BETA ACQUISITION CORPORATION, INC., and LUCKY STORES, INC.,
Appellees,

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW IN SUPPORT OF APPELLANT STATE OF CALIFORNIA

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INTRODUCTION

On October 16, 1989, this Honorable Court granted certiorari to hear the above entitled case. The Center for Public Interest Law of the University of San Diego School of Law ("Center for Public Interest Law"), as *amicus curiae*, respectfully urges this Court to grant the relief sought by the State of California and not to limit the antitrust remedies available to the courts to correct anticompetitive practices.

INTEREST OF THE CENTER FOR PUBLIC INTEREST LAW

The Center for Public Interest Law is a non-profit, academic public interest law center specializing in antitrust and regulatory issues. It is vitally interested in ensuring effective enforcement of state and federal antitrust laws. One of the primary missions of the Center for Public Interest Law is to promote effective enforcement of the antitrust laws, especially the remedial provisions of Section 16 of the Clayton Act so that all the citizens of this nation may enjoy the benefits Congress intended by protecting competitive markets.

The Center for Public Interest Law supports

California's contention that divestiture, like other equitable remedies, should be available to private plaintiffs, as well as the courts, in cases brought under Section 16 of the Clayton Act. The Ninth Circuit's contrary holding in *California v. American Stores*, 872 F.2d 837 (9th Cir.1989) is unwarranted by any policies underlying the antitrust laws and poses a serious threat to effective antitrust enforcement.

ARGUMENT

The Ninth Circuit's decision in this case imposes a categorical bar, under Section 16, to the use of the divestiture remedy which this Court has long recognized provides the most effective relief against unlawful mergers. (*United States v. E.I. Du Pont de Nemours & Co.*, 336 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961).) In effect, the Ninth Circuit, without the benefit of new statutory law, has developed a *per se* laches bar

to all private actions seeking to remedy the harm threatened by complete mergers. While the doctrine of laches has a long history as an equitable defense, (*Standard Oil Company of California v. United States*, 685 F.2d 1322 (U.S.C.C. 1982); *Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, U.S. Department of Energy*, 683 F.2d 1171 (8th Cir. 1982); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800 (8th Cir. 1979), it is a defense uniquely suited to the nice adjustments which are correctly made under varying factual situations. Trial courts are equipped to make these individualized decisions. The Ninth Circuit's decision here turns these principles on their head. The very fact that the Ninth Circuit's "no-divestiture" rule precludes district courts from weighing factors such as the diligence of the plaintiff, the presence or lack of prejudice to the merging parties and, most importantly,

the threat of injury and availability of alternative, effective relief, suggests the inappropriateness of a *per se* and categorical bar based on the laches related rationale here posited by the Ninth Circuit.

California was well-justified in awaiting final action by the FTC following its review of the materials provided under the Hart-Scott-Rodino Antitrust Improvements Act before initiating this action. (15 U.S.C. 18a.) Indeed, the Ninth Circuit opinion simply ignores the District Court's finding that California should have initiated this suit before the FTC reached even a tentative conclusion that the acquisition of Lucky by American Stores was unlawful, but could be remedied by the consent agreement its staff proposed. (872 F.2d at 846.) It is difficult to conceive of a ruling which suggests a greater waste of scarce judicial resources than one which compels private parties to ignore the H-S-R review

procedures and rush to court for fear of losing the possibility of effective relief.

Two additional factors render a categorical laches defense regrettable. First, an unjustified merger is not simply a matter of retroactive loss. An unlawful merger which cannot be unwound will create continuing prospective damage to consumers. It increases concentration, raises prices, limits consumer choice and affects the fluidity of entry and economic opportunity. (*Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. Von's Grocery Company*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966).)

Second, a public policy that no merger may be unwound provides a strong incentive to spring them secretly and quickly. Where the only relief may be prospective, it is to be expected that merger tactics will

evolve to make prospective remedies ineffective remedies.

Finally, the Center for Public Interest Law would point out the plain wording of Section 16 of the Clayton Act, "Any person . . . shall be entitled to . . . have injunctive relief under the same conditions and principles as . . . granted by the courts of equity . . ." The Ninth Circuit has carved out divestiture as a separate species of injunctive relief, so distinct from other remedies that purportedly it should be excepted from the plain language of the statute. The significance of this exception is not limited to just mergers law. It is likely that in other substantive areas of antitrust law, such as monopolization under the Sherman Act, the "no-divestiture rule" of the Ninth Circuit will preclude the only effective relief in cases brought under Section 16.

In fact, as the range of cases interpreting

Section 16 shows, divestiture is but one form of injunctive relief on a broad continuum of ameliorating options open to district courts. This range extends from forced sale of assets and compulsory licensing of intellectual property to import bans and mandating the provision of goods and services to all comers. (*cf. Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F.Supp. 1219, 1221 (D.C. Cal. 1973); *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 726 (3d Cir. 1962).) Are these injunctive remedies also to be written out of Section 16 of the Clayton Act?

As this Court has indicated, the grant of injunctive remedies to private parties "serves the high purpose of enforcing the antitrust laws . . . . Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of

nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" (*Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130-131 (1969).) All forms of injunctive relief disrupt an offending firm's post-violation operations--that is the purpose of injunctive relief. Whether such disruptions are justified should hinge on the efficacy of the particular remedy to redress the perceived harm, not on arbitrary limitations on the availability of options. If a court cannot right a wrong flowing from a violation of the antitrust laws, how is the grant of equitable powers to the courts of any practical use?

Congress intended the courts to be the arbiters of the behavior which violates the substantive provisions of the antitrust laws. That role should not be delegated solely to the FTC or the Department of

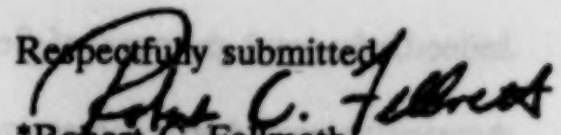
Justice. The Ninth Circuit's decision in this case makes the courts hostage to the relief decisions made by the FTC without the benefit of public hearing or judicial review. Our basic competition statutes are too precious to hand the keys to effective relief to a single keeper. Indeed, the very purpose of Section 16 of the Clayton Act was to ensure that the courts remain open to private parties to serve the high purpose of enforcing the substantive provisions of our national economic charter where the federal government is unable to do so. It would be ironic if the vehicle chosen by the Congress to accomplish that purpose precludes private parties from securing the most effective relief available to prevent the harm which flows naturally from mergers which violate Section 7 of the Clayton Act.

CONCLUSION

For the foregoing reasons, the Center for Public Interest Law respectfully asks this Court to reverse the judgment of the Ninth Circuit.

Dated: November 22, 1989

Respectfully submitted,



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November 30, 1989

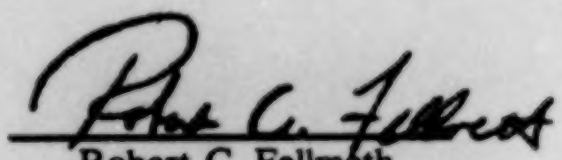
CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 1989, 3 copies of this pleading were sent by United States mail addressed to the following counsel for each of the parties to this action:

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